BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Re: KEITH L. WHEATON, a disbarred member of The West Virginia State Bar

Bar No.: 6810
Supreme Court No.: 35462
I.D. No.: 10-03-068

RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE OF THE WEST VIRGINIA LAWYER DISCIPLINARY BOARD FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Keith L. Wheaton, has filed a Petition for Reinstatement seeking reinstatement of his license to practice law in West Virginia. After carefully considering the evidence of record, the Hearing Panel Subcommittee has reached the following conclusions and recommendation.

I. PROCEDURAL HISTORY

On April 16, 2003, a Six-Count Statement of Charges was filed against Petitioner charging him with multiple violations of the Rules of Professional Conduct. On September 8 and 9, 2003, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board heard evidence on the matter. The Board issued its decision in the matter on May 13, 2004, finding that clear and convincing evidence established that Petitioner committed thirty-one violations of the Rules of Professional Conduct as follows: two counts of violating Rule 1.2(a) [abiding by a client's decision]; four counts of violating Rule 1.3 [diligence]; three counts of violating Rule 1.4(a) [keeping the client informed about the status of a matter]; two counts of violating Rule 1.4(b) [explaining a matter to

the extent reasonably necessary for the client to make an informed decision]; two counts of violating Rule 1.5(c) [failure to have written contingency fee contract and/or itemized statement]; one count of violating Rule 1.15(a) [keeping client or third person property separate from lawyer's own property]; two counts of violating Rule 1.15(b) [promptly delivering property to a client or third person]; four counts of violating Rule 1.16(d) [failure to return unearned retainers]; two counts of violating Rule 3.2 [expediting litigation]; two counts of violating Rule 8.1(a) [knowingly make a false statement of material fact during the course of investigation of an ethics complaint]; five counts of violating Rule 8.4(c) [engaging in conduct involving dishonesty, fraud, deceit or misrepresentation]; and two counts of violating Rule 8.4(d) [conduct prejudicial to the administration of justice].

The Hearing Panel Subcommittee also made the following recommendations as the appropriate sanctions:

a. That Petitioner's law license be annulled. As a "self-policed" organization, the easier course of action would be a lesser sanction; however, in making this recommendation the Subcommittee is mindful of the damages suffered by the individual clients, as well as to the public perception and integrity of the legal system.

b. That prior to petitioning for reinstatement of his law license, that Petitioner be ordered to reimburse:
   (1) Complainant Christensen in the amount of $450.00;
   (2) Complainant Pruden in the amount of $300.00;
   (3) Complainant Mason in the amount of $500.00 and fully satisfy the judgment assessed against him by the Federal Bankruptcy Court.

c. That prior to reinstatement that Petitioner be required to demonstrate that he has an understanding of the Rules of Professional Conduct

and that he be required to undertake an additional eighteen (18) hours of ethics and office management continuing legal education prior to reinstatement of his law license.

d. That should Petitioner be reinstated to practice law, that consideration be given to requiring the Petitioner submit to supervised practice for a substantial period to be determined at that time. The Hearing Panel Subcommittee would recommend at least a two year supervisory period.

e. That Petitioner be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

The Supreme Court of Appeals of West Virginia adopted the recommendations of the Lawyer Disciplinary Board by Opinion filed on November 12, 2004,[1] and Petitioner's law license was annulled by Order entered on January 20, 2005. Petitioner filed his Petition for Reinstatement on or about January 20, 2010, satisfying the mandatory five year waiting period under Rule 3.33(b) of the Rules of Lawyer Disciplinary Procedure.

On March 9 and 10, 2011, a hearing was held on the Reinstatement Petition in Martinsburg, West Virginia. Presiding over this matter were Hearing Panel Subcommittee members, Paul T. Camilletti, Esquire, Chairperson; John W. Cooper, Esquire; and Cynthia L. Pyles, laymember. Petitioner appeared in person and *pro se*, and Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, and Renée N. Frymyer, Lawyer Disciplinary Counsel appeared on behalf of the Office of Disciplinary Counsel.

The Subcommittee received into evidence Exhibits 1–17 submitted by the Office of Disciplinary Counsel and Exhibits 1-12 submitted by Petitioner. The Subcommittee heard the testimony of Jay Mullin, Audrey Wheaton, Steven Greenbaum, Esquire, and

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[1] Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E. 2d 8 (2004).

Pastor Ronald Paige on behalf of Petitioner and Dwane Heckman, Jesse McClendon, Margo Bruce, Pamela Mason, Nancy Christensen, Conley Dunlap, Sharon Puller, Edward Jackson and Efrem Laboke on behalf of the Office of Disciplinary Counsel. Petitioner also testified. The parties were asked by the Subcommittee to submit their proposed Findings of Fact, Conclusions of Law and Recommendation on or before May 3, 2011.

II. STANDARD FOR REINSTATEMENT

The primary authority in West Virginia on the standard for reinstatement of a lawyer whose license was annulled, *In re Brown*, provides:

> The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment, he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration.
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> Syl. Pt. 1, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980) (*Brown II*); Syl. Pt. 2, *Lawyer Disciplinary Board v. Sayre*, 207 W.Va. 654, 535 S.E.2d 719 (2000).

Furthermore,

> Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct.
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> Syl. Pt. 2, *In re Brown*, Id. (*Brown II*); Syl. Pt. 3, Sayre, Id.

The fundamental question which must be addressed is whether the attorney seeking reinstatement has shown that he presently possesses the integrity, moral character

and legal competence to assume the practice of law. *Lawyer Disciplinary Board v. Hess*, 201 W.Va. 192, 495 S.E.2d 563 (1997). Petitioner's prior and subsequent conduct is relevant to the determination. The Office of Disciplinary Counsel asserts that the Petitioner's burden of proof to establish the foregoing is that of clear and convincing evidence. This is the same standard applied in all lawyer disciplinary cases under Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. This is also the same burden lawyers who have been administratively suspended for a disability must meet pursuant to Rule 3.24(a) of the Rules of Lawyer Disciplinary Procedure.

III. PROPOSED FINDINGS OF FACT

A. Background

Petitioner was born in 1967. He received his Bachelor of Arts Degree in Political Science from Hampton University, Hampton, Virginia, in 1989. He received his Juris Doctor degree from West Virginia University College of Law in 1992 and was admitted to The West Virginia State Bar on May 1, 1995. Initially, Petitioner worked for the West Virginia State Tax Department in the Criminal Investigations Unit but relocated to Martinsburg, West Virginia, in or about May of 1996 and established a solo law practice. While based in Martinsburg, West Virginia, Petitioner handled both civil and criminal cases in both federal and state courts in Berkeley, Jefferson, Morgan, Hardy and Hampshire counties.

The Statement of Charges issued by the Lawyer Disciplinary Board on April 16, 2003 was based upon a five-year span of misconduct following Petitioner's move to Martinsburg. The allegations of misconduct are summarized as follows with the Court's corresponding findings, which Petitioner did not contest.

Count One - Complaint of Margo Bruce

Ms. Bruce retained Petitioner in 1999 to represent her in a civil action. She paid an initial fee of $300.00, then a second fee of $150.00. A settlement was reached on or about September 21, 2000, in the amount of $15,000.00. Petitioner deposited the settlement check into his business account, as he did not have an IOLTA account activated at the time. Petitioner proceeded to write a check to Ms. Bruce in the amount of $10,000.00 for her portion of the settlement proceeds. The check failed to clear due to lack of sufficient funds. Petitioner explained the situation as a banking error and promised prompt payment to Ms. Bruce. When Petitioner failed to pay Ms. Bruce, she contacted local law enforcement and a felony worthless check warrant was issued.

Thereafter, Petitioner obtained a cashier's check for $10,000.00. Petitioner told both the Office of Disciplinary Counsel and the local law enforcement authorities that Ms. Bruce would receive her money shortly and sent copies of the cashier's check to both law enforcement and the Office of Disciplinary Counsel as proof of payment. Ms. Bruce never received the cashier's check. However, it was later discovered that the check had been cashed. Local law enforcement investigated and learned the check had been redeposited into Petitioner's own account. During the evidentiary hearing before the Board, Petitioner admitted that he redeposited the same into his personal account to cover the closing costs of his personal residence.

The Court found that Petitioner violated Rule 1.15 by failing to set up, maintain, and/or deposit the settlement check into a proper trust account. The Court found a second violation of Rule 1.15 because Petitioner failed to deliver Ms. Bruce her funds, and

additionally, converted the same to his own personal use. As a result of failing to have a written contingency fee agreement and failing to provide an itemized statement, the Court found Petitioner violated Rule 1.5 (c). Moreover, the Court found that Petitioner's intentional taking of a client's funds for his own use and his misrepresentations made to the Office of Disciplinary Counsel during the investigative process violated Rule 8.1.

Count Two - Complaint of Pamela Mason

Ms. Mason retained Petitioner to pursue a discrimination claim in May 1997, and tendered $500.00 to him. After Ms. Mason's many attempts to contact Petitioner regarding the status of her case, Petitioner sent her a letter dated January 15, 1999, stating he had filed suit and enclosed a copy of the signed complaint. Ms. Mason filed for bankruptcy under Chapter 7 of the United Stated Bankruptcy Code, where she listed as an asset an interest in the claim being pursued on her behalf by Petitioner. Petitioner was appointed as special counsel in the bankruptcy claim to pursue the discrimination claim on behalf of the bankruptcy estate. He then filed an affidavit with the bankruptcy court and enclosed a copy of the complaint that he earlier had sent to Ms. Mason. After many attempts to get information from Petitioner, the bankruptcy trustee contacted the circuit court where Ms. Mason's civil action allegedly had been filed by Petitioner. The bankruptcy trustee discovered that, in fact, no civil action had ever been filed, and further, that any action would be time barred as the applicable statute of limitations had run. Petitioner then failed to appear at several hearings before the bankruptcy court and failed to respond to the bankruptcy trustee's further requests for information.

On November 26, 2001, an adversary proceeding was filed against Petitioner in bankruptcy court. A partial motion for summary judgment was granted as to liability, and a later hearing on damages was held on September 12, 2003. By Order entered October 23, 2003, the bankruptcy court ordered judgment against Petitioner to be paid to Ms. Mason's bankruptcy estate in the amount of $45,000.00.

The Court found that Petitioner violated Rule 1.3 by failing to pursue a matter for which he was retained and by falsely representing that he had filed a civil action when he had not and found violations of Rule 1.16 as a result of Petitioner's failure to adequately pursue the matter, his failure to withdraw from the case when it was clear that he could not, or chose not to, perform the legal services, and failure to refund the advance payment of the fee which was paid but not earned. Additionally, the Court found that Petitioner violated Rule 1.4 by failing to return his client's phone calls, failing to provide her with sufficient information to participate in decisions, failing to advise her that he had not filed a civil action on her behalf, failing to advise her that the statute of limitations had run on her claim, and failing to fulfill reasonable client expectations for information consistent with the client's best interests. The Court also found that Petitioner dilatory practices and failure to make reasonable efforts to further litigation resulted in a violation of Rule 3.2 and found that Petitioner falsely indicated that a civil action had been filed when, in fact, none had, in violation of Rule 8.4. Lastly, Petitioner failed to reduce his contingency fee agreement to writing in violation of Rule 1.5(c).

Count Three - Complaint of Nancy Christensen

Ms. Christensen retained Petitioner to represent her in a suit against the Veteran Affairs Medical Center in June of 1998. When Petitioner determined that the case was not proceeding toward mediation as hoped, Ms. Christensen tendered $150.00 to Petitioner to cover the costs of filing a civil action. After several attempts to check on the status of her case, Ms. Christensen received a letter from Petitioner dated July 5, 2000, wherein he indicated he had unilaterally rejected a proposed settlement offer in the amount of $5,000.00. The letter also indicated that mediation was the best way to proceed and that the court had removed the case from its docket. After receipt of the letter, Ms. Christensen attempted to see Petitioner to discuss her case. When Petitioner failed to appear at his office for a scheduled meeting, Ms. Christensen returned home and called the courthouse. She then discovered that no civil action had been filed on her behalf against the Veteran Affairs Medical Center.

The Court found that Petitioner violated Rule 1.3 by failing to pursue a matter for which he was retained; by falsely representing that he had filed a civil action when, in fact, he had not; and by failing to protect his client's claim against the statute of limitations. Petitioner's failure to return Ms. Christensen's phone calls, failure to provide her with information about her case, and failure to advise her regarding the status of the filing of her case resulted in a violation of Rule 1.4 and Petitioner's unilateral rejection of a proposed settlement offer without advising Ms. Christensen of the same violated Rule 1.2(a). The Court also found that Petitioner violated Rule 3.2 by his dilatory practices and failure to make reasonable efforts consistent with his discussions with Ms. Christensen. Furthermore, the

Court found that Petitioner violated Rule 1.16 by failing to pursue the matter on behalf of Ms. Christensen, by failing to withdraw from representation when he chose not to perform legal services, and by failing to refund the advanced payment of the fee that was not earned. Finally, the Court found that Petitioner violated Rule 8.4 when he falsely represented to Ms. Christensen that he had filed a civil action on her behalf.

Count Four - Complaints of Keith and Marianne Short, Dr. Lurito, Dr. Gerwin

The Shorts retained Petitioner to represent them in a personal injury action which was scheduled for trial in one month. The Shorts gave Petitioner $7,500.00 to cover the advance payments needed for the expert witnesses who would testify at trial. A jury verdict was awarded in the amount of $34,726.30, which Petitioner deposited into his IOLTA account. Petitioner then wrote a check to the Shorts for their portion of the award and wrote himself a check for his fee. The check written to the Shorts was returned for insufficient funds. A second felony worthless check warrant was issued against Petitioner as a result.

During the course of representing the Shorts, Petitioner hired Dr. Lurito to testify and produce a report regarding future and past economic damages. Dr. Lurito's fee was $2,500.00. The checks written by Petitioner to Dr. Lurito were returned for insufficient funds. Dr. Gerwin was also hired to be an expert in the case, and his fees totaled $2,300.00. Although Dr. Gerwin received a $50.00 check which cleared, the remaining $2,250.00 in checks were returned for insufficient funds.

The Court found violations of Rule 1.15(b) by Petitioner's failure to deliver client funds, failure to pay for expert services, and misappropriation of advanced funds and settlement proceeds to his own use. If was further found that Petitioner intentionally

converted his clients' funds to his own use in violation of Rule 8.4. Finally, the Court found that Petitioner violated Rule 8.1 when he made material misrepresentations to the Office of Disciplinary Counsel in connection with the investigation of the ethics complaints, and falsely represented to the Office of Disciplinary Counsel that his clients and the retained experts had either been paid in full or would be paid by a certain date.

Count Five - Complaint of Edward K. Pruden, Sr.

Mr. Pruden retained Petitioner to represent him in a wrongful termination case and tendered $150.00. When Petitioner informed Mr. Pruden that negotiations were not proceeding as planned, Mr. Pruden tendered an additional $150.00 for filing fees. After several failed attempts to contact Petitioner regarding the status of his case, Mr. Pruden received a letter from Petitioner dated July 5, 2000, wherein he indicated he had unilaterally rejected a proposed settlement offer in the amount of $5,000.00. The letter also indicated that mediation was the best way to proceed and that the Court had removed the case from its docket. After reading an article in the newspaper about Petitioner's problematic representation of another client, Mr. Pruden went to the court house and discovered that no civil action had ever been filed on his behalf.

The Court found that Petitioner violated Rule 1.3 by failing to pursue a matter for which he was retained and by falsely representing that he had filed a civil action when, in fact, he had not. The Court also found that Petitioner violated Rule 1.4 by failing to return his client's phone calls, failing to provide Mr. Pruden with sufficient information to participate in decisions, failing to advise him that he had not filed a civil action on his behalf, and failing to fulfill reasonable client expectations for information consistent with client's

best interests. Moreover, Petitioner's unilateral rejection of a proposed settlement offer, without advising Mr. Pruden of the same, violated Rule 1.2(a) and Petitioner's failure to adequately pursue the matter and failing to withdraw when it was clear that he could not, or chose not to, perform the legal services for which he had been retained violated Rule 1.16. Finally, the Court found Petitioner violated Rule 8.4 because he misrepresented to his client that a civil action had been filed and that the court had removed the case from its docket.

Count Six - Complaint of Elizabeth Crawford

In 1999, Ms. Crawford and approximately fifty other people met with Petitioner to discuss a class action lawsuit regarding possible civil rights infringements. Ms. Crawford tendered a check in the amount of $300.00 to be included in the class and for the filing fees. After several failed attempts to contact Petitioner regarding the status of the case, Ms. Crawford eventually discovered that no class action suit had been filed.

The Court found that Petitioner violated Rule 1.3 because he failed to pursue the matter on behalf of Ms. Crawford after she retained his services. The Court also found violations of Rule 1.16 because Petitioner failed to pursue the matter, failed to withdraw from representation when it was clear he could not, or chose not to, perform the legal services, and failed to refund the advanced payment of the fee that had not been earned.

Other Ethics Complaints

There were fourteen additional open complaints at the Office of Disciplinary Counsel at the time of Petitioner's disbarment. All were closed based on Petitioner's disbarment and were ordered to be placed in his reinstatement file for future consideration. The allegations of those complaints are summarized as follows:

Complaint of Frank and Lona Ramsey (00-02-535)

In late February, 1999, the Ramseys contacted Petitioner about representing them in several potential lawsuits. Petitioner agreed to act as an "advisor" on the cases and requested a $500.00 retainer. The Ramseys provided a $300.00 payment to Petitioner. On or about March 14, 1999, Petitioner contacted the Ramseys and informed them he would represent them in the matters. At the time he took on the representation, Petitioner was aware that the deadline for filing the lawsuits was May 6, 1999. Petitioner requested a $1,000.00 retainer, and the Ramseys made an additional $100.00 cash payment toward the retainer.

Over the course of the next two months, Petitioner assured the Ramseys on several occasions that their cases would be filed prior to the deadline. However, the Ramseys learned that Petitioner ultimately missed the May deadline for filing. The Ramseys were informed by Petitioner that since the suits involved alleged civil rights violations, the cases were handled differently and the deadlines were more than the standard two years. Petitioner also advised that the lawsuits would be filed in the United States District Court for the Northern District of West Virginia by the end of June, 1999.

At the end of June, 1999, the Ramseys were informed by the Federal Court in Martinsburg that no suit had been filed. However, Petitioner subsequently informed the Ramseys that the suits had indeed been filed in the Federal Court in Elkins. The Ramseys submitted another $100.00 payment toward the retainer on or about July 19, 1999. On or about October 22, 1999, the Ramseys were advised by Petitioner of their docket number, but when they contacted the Court, the Clerk could not locate any cases listing the Ramseys as parties. Petitioner did not respond to further inquiries from the Ramseys.

Complaint of Conley Dunlap (01-02-188)

Mr. Dunlap retained Petitioner to represent him in a claim against the Hampshire County Board of Health, the duly elected members of the Hampshire County Commission, and the Hampshire County Commission itself. Mr. Dunlap believed Petitioner did not adequately prepare the matter for trial which resulted in the case being thrown out by the Circuit Court. Mr. Dunlap also asserted that Petitioner did not prepare an adequate appeal in the matter and the document contained many factual errors. Mr. Dunlap believed there to be a general lack of attention of Petitioner while handling these matters and he also believed Petitioner deliberately misled him.

Complaint of Donald Dewitt (01-02-275)

Petitioner was appointed to assist Mr. Dewitt in filing a *coram nobis* petition. In the meantime, Mr. Dewitt also retained Petitioner for representation in a Driving on a Suspended License while Driving Under the Influence charge and paid a $1,000.00 retainer fee. Mr. Dewitt pled guilty to the charge in November 2000, with the understanding that Petitioner would file a Petition for Home Confinement. The same was filed in or about December 2000, and was referred to the probation department to determine if Mr. Dewitt was a suitable candidate. Mr. Dewitt was ultimately denied home confinement. Mr. Dewitt asserted that Petitioner did not earn his fee for the criminal matter and never completed the *coram nobis* petition on his behalf. Mr. Dewitt also asserted that Petitioner would not respond to his inquiries about the matter.

Complaint of Gerald Couch (01-02-518)

On or about February 25, 1999, Mr. Couch retained Petitioner to represent his grandson in a matter involving the Morgan County School District and paid a $1,000.00 retainer. In May 1999, at a meeting in Petitioner's office, Mr. Couch signed documents which he was told would be filed in Federal Court. Thereafter, when Mr. Couch would call Petitioner regarding the status of the case, Petitioner would report that he was waiting on a court date.

On or about April 7, 2000, Mr. Couch's wife was involved in an automobile accident. Petitioner informed Mr. Couch that he would file suit in that matter as well. In July 2001, Mr. Couch contacted the courthouse and was told that no suits had been filed in either case. Mr. Couch contacted Petitioner and was told that Petitioner had documents to the contrary. Mr. Couch scheduled a meeting with Petitioner on July 25, 2001, but Petitioner never appeared. Mr. Couch terminated Petitioner's services at this time and requested a full refund, but never received such.

Complaint of Arthur Shanholtz (02-01-280)

Petitioner represented Mr. Shanholtz's son in a criminal matter in 1998. Mr. Shanholtz believed that Petitioner pushed his son into accepting a plea agreement which resulted in his son going to prison for a longer period of time than he would have following a trial. Mr. Shanholtz asserted that his son did not receive adequate representation from Petitioner.

Complaint of Edward Jackson (02-01-323)

In 2000, Mr. Jackson paid a $1,000.00 retainer to Petitioner for representation in a class action suit. Petitioner failed to timely file the suit and the statute of limitations ran. Whereupon, Mr. Jackson sued Petitioner in Magistrate Court and a judgment was entered against Petitioner in the amount of $700.00. Mr. Jackson asserted that Petitioner paid only $100.00 of the sum owed to him.

Complaint of Daniel Subic (03-03-099)

Mr. Subic retained Petitioner for a $500.00 fee on or about January 7, 2003. Mr. Subic asserted that communication from Petitioner was nonexistent, so he terminated Petitioner's services on or about February 13, 2003 and asked to be refunded the full retainer. Mr. Subic never received a refund from Petitioner.

Complaint of Darlene Pereira (03-03-132)

Ms. Pereira discussed with Petitioner representation in a lawsuit against an automobile company for child endangerment. Petitioner informed Ms. Pereira that he would take his fee from any settlement in the case and he would attempt to negotiate a settlement with the insurance company. Petitioner also informed Ms. Pereira that if a settlement was not reached, he would file suit. Ms. Pereira asserted that Petitioner did not communicate with her regarding the case and a civil suit was never filed.

Complaint of Edward Lowe (03-03-324)

On or about January 22, 2003, Mr. Lowe paid Petitioner a $250.00 retainer fee and a $150.00 filing fee for representation in an uncontested divorce. Mr. Lowe stated that he subsequently had no contact with Petitioner. On or about June 25, 2003, Mr. Lowe contacted

the Berkeley County court and was informed that no divorce petition had ever been filed on his behalf. Mr. Lowe demanded a refund of his money from Petitioner but did not receive such. After filing an ethics complaint with the Office of Disciplinary Counsel, Mr. Lowe advised that in late August 2003, he received a full refund from Petitioner.

Complaint of Karla Dozier (03-03-456)

Ms. Dozier hired Petitioner on behalf of her mother to prepare and file a Petition to Enjoin Involuntary Discharge and was informed that Petitioner would pay the filing fee and that Ms. Dozier could later reimburse him $200.00. Apparently, Petitioner prepared a Petition but did not file it. At a meeting on or about June 5, 2003, Ms. Dozier confronted Petitioner about the Petition and was informed by Petitioner that his accountant had the Petition and it had been filed. Whereupon, Ms. Dozier paid Petitioner $100.00 toward the filing fee. Ms. Dozier subsequently contacted the Jefferson County Circuit Clerk and discovered that Petitioner never filed the Petition. Subsequent communication was reportedly refused by Petitioner.

Complaint of Sharon Puller (03-03-514)

Ms. Puller hired Petitioner on or about March 4, 1998 to represent her in litigation regarding a discrimination case and paid a $300.00 retainer fee. Petitioner successfully represented Ms. Puller in the discrimination suit before the West Virginia Human Rights Commission and Ms. Puller was awarded $1,000.00 in back pay, $3,277.45 for humiliation, embarrassment and emotional and mental distress and loss of personal dignity, and $7,987.50 for attorney fees. Ms. Puller asserted that following the above case, she received a right to sue letter from the Federal Equal Employment Opportunity Commission advising that she

may file a lawsuit in federal or state court and she believed Petitioner was to file suit within 90 days. Petitioner never filed suit after receiving the notice.

Complaint of Mary Gange (03-03-557)

Ms. Gange hired Petitioner to pursue a lawsuit in Berkeley County which was initially filed by Ms. Gange *pro se*. Ms. Gange paid Petitioner a $2,000.00 retainer. Petitioner subsequently failed to respond to discovery requests by the defendants. A Motion to Compel was filed by the defendants on June 27, 2003. No response was filed by Petitioner, even after an Order was entered requiring Petitioner to answer. Ms. Gange asserted that Petitioner failed to appear for court hearings, failed to depose witnesses, failed to prepare and file appropriate court documents, and failed to return her retainer and file.

Complaint of Elvin Watkins (04-03-138)

Mr. Watkins hired Petitioner in or about June 2003 to represent him in a discrimination case and was informed by Petitioner that he would file a suit on Mr. Watkins' behalf. Mr. Watkins stated that he subsequently tried calling Petitioner on several occasions but was unsuccessful. The lawsuit was never filed by Petitioner.

Complaint of Jesse McClendon (04-03-567)

Mr. McClendon was involved in an automobile accident in 2002 and hired Petitioner to represent him on a contingency fee basis. Petitioner received from Mr. McClendon's insurance carrier a check in the amount of $1,576.47 for medical bills and informed Mr. McClendon that he would pay the medical bills directly. Some time later, upon a routine

credit check when buying a home, Mr. McClendon learned that Petitioner had never paid the medical bills as promised.

B. Petitioner's History Following the 2005 Annulment

Bankruptcy

On January 14, 2005, Petitioner filed a Chapter 7 Bankruptcy Petition with the United States Bankruptcy Court for the Northern District of West Virginia.[2] The Petition listed assets in the amount of $15,975.00 and total liabilities of $194,364.83, which included fifteen (15) actual or potential legal malpractice lawsuits totaling over $85,000.00 in potential liability.[3] Said debts contained in the Petition were discharged and the case was closed by Order dated December 11, 2005. Petitioner did not make attempts at restitution to any of his former clients following his disbarment. [03/09/11 Transcript at 332].

Compliance with Rule 3.28 of the Rules of Lawyer Disciplinary Procedure

The duties of a lawyer in West Virginia once disbarred or suspended are enumerated in Rule 3.28 of the Rules of Lawyer Disciplinary Procedure.[4] Pursuant to Rule 3.28(a),

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[2] Case No. 3:05-bk-00180.

[3] Petitioner did not maintain malpractice insurance while practicing law.

[4] **Rule 3.28. Duties of disbarred or suspended lawyers.**
(a) A disbarred or suspended lawyer shall promptly notify by registered or certified mail, return receipt requested, or by first-class mail with the prior consent of the Office of Disciplinary Counsel, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court of agency, of the lawyer's inability to act as a lawyer after the effective date of disbarment or suspension and shall advise said clients to seek legal advice elsewhere. Failure of a disbarred or suspended lawyer to notify all clients of his or her inability to act as a lawyer shall constitute an aggravating factor in any subsequent disciplinary proceeding.
(b) A disbarred or suspended lawyer shall promptly notify by registered or certified mail, return

failure of a disbarred lawyer to notify all clients of his inability to act as a lawyer shall constitute an aggravating factor in any subsequent disciplinary proceeding. Petitioner did not take any steps to close his practice in accordance with this rule. [03/09/11 Transcript at 325].

Child Support Arrears

On November 17, 2006, the Family Court of Kanawha County entered an Order granting judgment to the State of West Virginia in the amount of $15,060.46 for three worthless checks submitted by Petitioner to the West Virginia Bureau for Child Support Enforcement. The Order also stated that Petitioner has accumulated child support arrears due to failure to pay his child support obligation as previously ordered by the Family Court of Kanawha County.[5] Petitioner testified that there are child support orders in place for all four

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receipt requested, or by first-class mail with the prior consent of the Office of Disciplinary Counsel, each of the lawyer's clients who is involved in litigated or administrative matters or proceedings pending, of the lawyer's inability to act as a lawyer after the effective date of disbarment or suspension and shall advise said client to promptly substitute another lawyer in his or her place. In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended lawyer to move pro se in the court or agency in which the proceeding is pending for leave to withdraw as counsel. The notice to be given to the lawyer for any adverse party shall state the place of residence of the client of the disbarred or suspended lawyer.

(c) The disbarred or suspended lawyer, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. During the period from the entry date of the order to its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date. Within twenty days after the effective date of the disbarment or suspension order, the lawyer shall file under seal with the Supreme Court of Appeals an affidavit showing (1) the names of each client being represented in pending matters who were notified pursuant to subsections (a) and (b); (2) a copy of each letter of notification which was sent; (3) a list of fees and expenses paid by each client and whether escrowed funds have been or need to be reimbursed; and (4) an accounting of all trust money held by the lawyer on the date the disbarment or suspension order was issued. Such affidavit shall also set forth the residence or other address of the disbarred or suspended lawyer where communications may thereafter be directed and a list of all other courts and jurisdictions in which the disbarred or suspended lawyer is admitted to practice. A copy of this report shall also be filed with the Office of Disciplinary Counsel.

[5] Family Court of Kanawha County, West Virginia, Civil Action No. 95-D-450.

(4) of his children and, although he makes attempts to pay, the actual figure of the current arrears is "way up there." [03/10/11 Transcript at 58].

On December 9, 2009, a Criminal Contempt Order was issued against Petitioner in the General Court of Justice, District Court Division, of Wake County, North Carolina which found that Petitioner had accrued a child support arrearage of $13,500.00 [ODC Exhibit 15]. The Order found that based upon the evidence beyond a reasonable doubt, Petitioner had willfully failed to make child support payments. According to the Order, Petitioner was placed on electronic monitoring. [ODC Exhibit 15 at 1050]. Petitioner subsequently filed a Motion for Modification of Existing Child Support Order and his child support obligation was reduced, but Petitioner continues to accrue arrears due to his unemployment.

Criminal Conviction

On August 31, 2009, Petitioner pled guilty to the misdemeanor criminal charge of Unauthorized Use of a Motor Vehicle and was placed on one year probation, fined $908.04, and given credit for five (5) days spent in confinement. Petitioner had been initially arrested and charged with the felony offense of Larceny of a Motor Vehicle stemming from not returning a rental car timely, and the aforementioned reflected a plea agreement reached with the State of North Carolina. [ODC Exhibit 13].

Other Civil Matters

In 2007, default judgment was entered against Petitioner in the amount of $2,000.00 in a Bedford County General District Court of Virginia civil case of Carl Wheaton v. Keith

Wheaton.[6] Petitioner stated that the subject of the Bedford matter was a personal loan from a family member and the judgment has not yet been paid. [03/10/11 Transcript at 76].

In 2009, Petitioner was named as a party in a repossession of motor vehicle action by Ford Motor Company. Judgment in that matter was for $4,831.93, with costs and interest to accumulate at 16.9 percent per annum from March 16, 2009.[7] Petitioner testified that the judgment remains outstanding. [03/10/11 Transcript at 75].

In August, 2009, two worthless check warrants were issued against Petitioner in the amounts of $1,300.00 and $210.00, respectively. Said warrants were dismissed without conviction after Petitioner paid full restitution to the parties. [03/10/11 Transcript at 62].

Employment

Petitioner has not held consistent full-time employment since his disbarment. In August 2008 he founded JBT Media Holdings, Inc., the parent company for Triangle Diversity Magazine, a bi-monthly multi cultural publication for the Triangle (Raleigh, Durham, Chapel Hill) area of North Carolina. Petitioner testified, however, that the magazine was currently "dormant" due to the economy. [03/09/11 Transcript at 296]. Petitioner occasionally conducts diversity training exercises with business groups in connection with JBT Media Holdings, Inc., but continues to seek full-time employment.

Petitioner was offered the opportunity to work for Aflac Insurance in Durham, North Carolina, in the summer of 2010, but due to his owing child support, was unable to accept the position, after passing the North Carolina Life and Health Insurance examination.

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[6] Bedford County, Virginia, courts do not have record of this action.

[7] Wake County Civil Court, North Carolina, Case No. 09-CVD-17315.

Petitioner seeks to work in a corporate legal department, in a firm, within a university or association if reinstated to the practice of law, where there is significant oversight of his daily actions.

Such career opportunities are abundant in Raleigh, North Carolina, where Petitioner resides, but are not available to Petitioner due to his being not licensed to practice law, which fact Petitioner does not hide.

Petitioner was offered employment on March 18, 2011, with a large law firm in the Charlotte, North Carolina area handling electronic document review of a massive amount of discovery in preparation for upcoming litigation; petitioner was not chosen for this employment due to the annulment of his license.

Community Service

Petitioner is an active member of Pleasant Grove Church in Cary, North Carolina and is active in various community outreach activities which mainly focus on social justice and youth. [03/10/11 Transcript at 7-32].

Compliance with prior Order of the Court

In Lawyer Disciplinary Board v. Wheaton, *supra*, the Supreme Court of Appeals adopted the recommendations as set forth by the Hearing Panel Subcommittee. Thus, prior to the reinstatement of his law license, Petitioner was ordered to comply with the following:

(1) Reimburse Complainant Nancy Christensen $450.00;

(2) Reimburse Complainant Edward Pruden $300.00;

(3) Reimburse Complainant Pamela Mason $500.00 and fully satisfy the judgment assessed against him by the Federal Bankruptcy Court;

(4) Demonstrate an understanding of the Rules of Professional Conduct and undertake an additional eighteen (18) hours of ethics and office management continuing legal education; and

(5) Reimburse the Lawyer Disciplinary Board the costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Petitioner has not reimbursed Ms. Christensen, Mr. Pruden, or Ms. Mason. [03/09/11 Transcript at 317]. Petitioner did not satisfy the $45,000.00 judgment assessed against him by the Federal Bankruptcy Court in Ms. Mason's case, but contends that the judgment was discharged in his bankruptcy proceeding. [03/09/11 Transcript at 335-336]. Petitioner has not completed any continuing legal education hours nor otherwise demonstrated an understanding of the Rules of Professional Conduct. [03/09/11 Transcript at 318]. Petitioner also has not made any payments to the Lawyer Disciplinary Board for the costs and expenses of the prior proceedings. ODC Exhibit 17 set forth total expenses in the amount of $13,353.39, and Petitioner agrees that the federal case law reflects that attorney disciplinary costs are non-dischargeable in bankruptcy. [Petitioner's Findings of Fact and Conclusions of Law paragraph 29].

Lawyers' Fund for Client Protection

Following the annulment of Petitioner's law license, the Lawyers' Fund for Client Protection of the West Virginia State Bar received six claims for compensation from clients who alleged that Petitioner had taken their money and not provided legal services. After

proper review and investigations by the Board of Trustees and approval by the Board of Governors, the Fund made payments to four (4) former clients of Petitioner that collectively totaled $12,005.00. [ODC Exhibits 3, 4, and 5].

C. Reinstatement Hearing

On March 9 and 10, 2011, a Reinstatement Hearing was held in the matter in Martinsburg, West Virginia. In addition to taking into evidence Exhibits 1–17 submitted by the Office of Disciplinary Counsel and Exhibits 1-12 submitted by Petitioner, the Hearing Panel Subcommittee heard testimony from thirteen (13) witnesses, not including that of Petitioner. The witness testimony is briefly summarized below.

Jay Mullin

Mr. Mullin, a friend and former neighbor of Petitioner, testified to Petitioner's character and how Petitioner has been negatively impacted by his disbarment. Mr. Mullin stated that he had not had any contact with Petitioner's former clients and was only aware of the nature of Petitioner's underlying offenses from articles that appeared in the newspaper. Mr. Mullin did not have knowledge of any restitution Petitioner had repaid to his former clients. Mr. Mullin's understanding was that Petitioner had been disbarred due to "misuse of funds." Mr. Mullin also testified that he had never been represented in a legal matter by Petitioner and did not have an opinion on Petitioner's fitness to practice law. [03/09/11 Transcript at 5-17].

Audrey Wheaton

Ms. Wheaton is Petitioner's mother. Ms. Wheaton testified as to the hardships Petitioner has undergone since his disbarment. Ms. Wheaton stated that she and other family

members assist Petitioner financially when they can and was thankful that Petitioner had not turned to drugs or alcohol during this time. Ms. Wheaton also stated that Petitioner "liked to be [his] own boss," and she did not believe that Petitioner ever intended to defraud his clients. [03/09/11 Transcript at 18-40].

Steven Greenbaum, Esquire

Mr. Greenbaum, an attorney practicing in Martinsburg, was of the opinion that Petitioner should be reinstated to practice law. Mr. Greenbaum testified to Petitioner's capabilities as an attorney prior to Petitioner's disbarment. Mr. Greenbaum believed Petitioner was a "strong" attorney previously. Mr. Greenbaum did not believe he personally had enough experience to supervise Petitioner should he be reinstated and was of the opinion that Petitioner would still have to prove himself in order to alleviate some skepticism if he began practicing law in the community again. Although Mr. Greenbaum was of the opinion that Petitioner was an effective advocate, he believed that Petitioner failed at the business aspect of law practice. [03/09/11 Transcript at 41-81].

Pastor Ronald Paige

Pastor Paige was of the opinion that Petitioner was highly respected in the community prior to his disbarment and that Petitioner often provided legal advice to his church. Pastor Paige testified that he would be willing to utilize Petitioner's legal services if he was reinstated, but it would be under the supervision of their current church counsel. [03/09/11 Transcript at 82-107].

Dwane Heckman

Mr. Heckman stated that he filed an ethics complaint following Petitioner's disbarment alleging that after representing him in a criminal case, Petitioner failed to file a civil case as promised and did not maintain adequate communication. Mr. Heckman did not believe Petitioner should be reinstated to practice law. [03/09/11 Transcript at 112-138].

Jesse McClendon

Mr. McClendon testified that Petitioner represented him in a personal injury matter and settled the case without his approval. Mr. McClendon also stated that he received $7,000.00 from that settlement from Petitioner's personal bank account but never signed any type of release with the insurance company. Mr. McClendon testified that Petitioner failed to pay medical bills from the settlement proceeds as promised. Mr. McClendon did not believe Petitioner should be reinstated to practice law. [03/09/11 Transcript at 138-159].

Margo Bruce

Ms. Bruce testified that she believed Petitioner should be reinstated to the practice of law. Ms. Bruce admitted that she might feel differently regarding Petitioner's reinstatement had she not eventually received the settlement proceeds in her underlying case. Ms. Bruce also stated that if Petitioner was reinstated, she would not recommend him to others as an attorney or retain him again for herself. She also stated that her dealings with Petitioner made her lose trust in lawyers. [03/09/11 Transcript at 160-167].

Pamela Mason

Ms. Mason testified that she has never received any payments of restitution from Petitioner and she believed that Petitioner's bankruptcy filing was not the honest thing to do.

Ms. Mason also testified that she believed Petitioner's disbarment was appropriate punishment and that Petitioner should not be reinstated to the practice of law. She also stated that dealing with Petitioner left a "scar" and that she still has some distrust in attorneys. [03/09/11 Transcript at 167-186].

Nancy Christensen

Ms. Christensen testified that she felt Petitioner's disbarment was appropriate and adequate punishment. She believed it was "convenient" that Petitioner filed for bankruptcy and stated that he never made attempts to provide her with restitution, despite the Supreme Court Order. Ms. Christensen stated that she did not think Petitioner deserves to ever practice law again and she would not change her opinion even if Petitioner paid her restitution. Ms. Christensen also stated that Petitioner never expressed any remorse to her. [03/09/11 Transcript at 186-195].

Conley Dunlap

Mr. Dunlap testified that despite paying Petitioner several thousand dollars, he did not provide adequate legal services. Mr. Dunlap stated that Petitioner did not prepare for a court hearing in his case, which resulted in the case being thrown out of court. Mr. Dunlap further stated that he paid Petitioner $2,500.00 for an appeal that was never prepared or filed. Mr. Dunlap testified that Petitioner would not communicate with him. Mr. Dunlap stated that he absolutely would not hire Petitioner as an attorney if he was reinstated [03/09/11 Transcript at 199-241].

Moore, 214 W. Va. 780, 793, 591 S.E. 2d 338 (2003). Based upon the record, the Panel concludes that Petitioner has not demonstrated such course of conduct or a record of behaving honorably since his disbarment.

In reaching this conclusion the Panel did not consider the additional ethical complaints pending against Mr. Wheaton at the time of his disbarment. It is the view of the Panel that the Office of Disciplinary Counsel did not have an opportunity to thoroughly investigate these complaints before they were closed upon Petitioner's disbarment. The Panel believes, in fairness to the Petitioner, these should not be considered in making its Recommendation. In particular, the complaint of Mr. Dunlap (01-02-188) is not considered. Mr Dunlap did testify at the hearing, but sufficient evidence was not developed to permit the Panel to consider his complaint on the issue of Petitioner's Reinstatement. Similarly, the testimony of Mr. Laboke will not be considered as there was no opportunity to investigate his assertion.

The evidence presented demonstrates that following the annulment of his law license, Petitioner failed to comply with Rule 3.28 of the Rules of Lawyer Disciplinary Procedure, incurred additional debts despite filing for bankruptcy, made zero attempts to provide restitution to his former clients, failed to comply with child support orders, was charged with a felony and subsequently convicted of a misdemeanor crime, and failed to comply with any of the requirements for reinstatement as ordered by the Supreme Court of Appeals. Although Petitioner's involvement in community service and outreach activities is respectable, it is not demonstrative of a course of conduct that would enable the Court to conclude if Petitioner is readmitted to the practice of law there would be little likelihood that Petitioner will engage in unprofessional conduct.

Furthermore, rehabilitation on the part of Petitioner must include, not only a demonstration of subsequent appropriate behavior, but also a state of mind in which he comes to terms with his past wrongdoing in such a way that his adherence to high moral standards in the future can be assured. However, in addition to expressing little if any remorse for his previous misconduct, Petitioner admitted that he does not handle his finances well and should not be placed in a position to handle any client money if reinstated to the practice of law. Thus, not only is the evidence insufficient to demonstrate that Petitioner will not engage in the conduct that led to his disbarment if he is reinstated, Petitioner's failure to correct his financial problems indicates that there is a strong likelihood of a repeated course of conduct.

Petitioner has also failed to carry his burden to prove that his reinstatement will not have a justifiable and substantial adverse effect of the public confidence in the administration of justice. Indeed, the primary purpose of an ethics proceeding "is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys." *Pence,* 171 W.Va. at, 74, 297 S.E.2d at 849 (1982). Petitioner's previous misconduct, an important consideration in this regard, was extremely serious and egregious, showing a willingness to be dishonest, to deceive, and to manipulate and violate the law for both personal and professional gain over a prolonged period of time. The witness testimony and public comments submitted by the Office of Disciplinary Counsel in Exhibit 10 overwhelmingly opine that Petitioner should not be reinstated to the practice of law at this time.

V. RECOMMENDATION

For the reasons set forth above, the Panel recommends that Petitioner Keith L. Wheaton's petition to be reinstated to the practice of law be DENIED.

Paul T. Camilletti

PAUL T. CAMILLETTI, Chairperson

Date: July 14, 2011

CYNTHIA L. PYLES

Date: JULY 12, 2011

John W. Cooper

JOHN W. COOPER

Date: July 11, 2011